The Institute has participated in this case because it raises two issues of great importance for certified public accountants and for professional men generally. The first concerns the power of a federal court to permit a criminal defendant to waive jury trial when a case will present issues so technical and complex, and will probably be so prolonged, that a jury very likely will be unable to try it fairly. The second involves the weight to be given to professional standards in assessing the criminal liability of members of a profession for alleged deficiencies in their professional work.

ISSUES PRESENTED

1. Where a defendant in a federal criminal proceeding elects trial without a jury and a substantial showing is made to justify that election, does the court lack power to try the case without a jury solely because of the prosecutor's unsupported refusal to consent?

2. Where a professional person is charged with a federal criminal offense for professional conduct on which he would necessarily look for guidance to the recognized standards of his profession, may he be held liable if his conduct is found to have fully conformed to those standards?

STATEMENT OF THE CASE

The petitioners were two partners and a senior associate in the accounting firm of Lybrand, Ross Bros. & Montgomery. They were convicted on three counts of mail fraud and conspiracy for asserted deficiencies in the 1962 financial statements of Continental Vending Machine Corporation, on which the Lybrand firm had issued its opinion after an audit supervised by the de-

fendants. The opinion represented that the financial statements "present fairly the consolidated financial position of Continental . . . in conformity with generally accepted accounting principles." (Gov. Ex. 1-A-1).

The crux of each count was the allegation that Continental's 1962 balance sheet in fact did not fairly present Continental's financial position because of inadequate disclosure concerning loans made by Continental to its affiliate, Valley Commercial Corporation, which in turn had made loans to Harold Roth, Continental's president and a major stockholder in both companies. In essence, the prosecution contended that Continental's balance sheet should have disclosed that Valley had made the loans to Roth; that Roth was unable to repay them; and that collateral posted by Roth to secure Valley's indebtedness to Continental consisted principally of securities of Continental. It was further charged that the defendants knew that without these disclosures the statements were false and misleading, and had conspired to make them so with intent to defraud.

The Government required two trials to secure a conviction. In each the defendants sought to waive a jury, contending that the trial would be so extended and the isues so technical and complex as to be beyond the reach of a jury's capabilities; the Government without explanation withheld consent; and the court refused to allow waiver on the authority of Rule 23(a) of the Federal Rules of Criminal Procedure[1] and *Singer* v. *United States,* 380 U.S. 24 (1965).

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[1] Rule 23(a) provides that "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

The first trial ended after almost two months with the jury deadlocked 11 to 1 for acquittal. After another trial lasting a month, the second jury convicted. Notwithstanding his observation that had he been the trier of fact he "would probably have found sufficient doubt to warrant acquittal," (R. 44, p. 1), the judge in the second trial denied post-trial motions for a new trial and acquittal notwithstanding the verdict.

The trial turned on numerous technical questions of accounting concerning the finances of Continental, its affiliate and its president over a five-year period. The central controversies concerned the balance sheet disclosures required by generally accepted accounting principles with respect to the loans between Continental, Valley and Roth. Eight experts for the defense testified in the second trial that the extent of disclosure in the balance sheet was in conformity with generally accepted accounting principles. Two prosecution experts testified to the contrary, although they could point to no specific rule or precedent to support their position and the senior of the two acknowledged that other honest and competent accountants might disagree with his views.

The trial court refused the defendants' request that the jury be instructed to test their professional work by the standards of their profession. Under the requested instructions, the jury would have been permitted to convict only if it found that Continental's balance sheet did not fairly present its financial position according to generally accepted accounting principles, and that the defendants knew that the presentation was not fair. Instead, the trial court charged that on the question whether the balance sheet was false

or misleading the "critical test" was whether it "fairly presented" Continental's financial position —but without reference to generally accepted accounting principles. (Tr. 3982). The court further charged that, in determining whether a fact was required to be disclosed in order to render the presentation fair, the jury might consider whether the fact was one to which "an average, reasonably prudent person would attach importance in determining a course of conduct," such as "whether or not to buy or sell stock, or to lend or refuse to lend money." (Tr. 3973). On the separate issue of intent, the jury was told that it could consider evidence that the balance sheet conformed to generally accepted accounting principles as "very persuasive" but "not necessarily conclusive" of defendants' good faith. (Tr. 3981).

The Court of Appeals, affirming, upheld the trial court's charges and refusals to charge. As to fair presentation of Continental's financial position, it stated that "[t]he critical test according to the charge was the same as that which the accountants testified was critical." The Court of Appeals continued:

> "We do not think the jury was also required to accept the accountants' evaluation whether a given fact was material to overall fair presentation, at least not when the accountants' testimony was not based on specific rules or prohibitions to which they could point, but only on the need for the auditor to make an honest judgment and their conclusion that nothing in the financial statements themselves negated the conclusion that an honest judgment had been made. Such evidence may be highly persuasive, but it is not conclusive, and so the trial judge correctly charged."

On the sufficiency of the evidence, the Court of Appeals relied upon what it found to be dishonesty in Roth's conduct in concluding that the record supported findings that the disputed disclosures were required to render the balance sheet not misleading and that the defendants had acted with the requisite wrongful intent. Finally, the Court of Appeals upheld the denial of the defendants' request for a non-jury trial on the authority of *Singer* v. *United States, supra.*

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted in this case to resolve an important unsettled issue regarding the power of a federal court to accept a defendant's waiver of jury trial where the defendant makes a substantial showing that a jury may not be capable of fair and true decision. The courts below held that they lacked such power solely because of the prosecution's unsupported refusal to consent.

The issue is important to accountants and other professional men because the jury process is often unsuited for deciding disputes as to technical professional questions that are likely to involve complex factual issues, extensive conflicting expert testimony, and protracted trial. As the Court observed in *Singer* v. *United States, supra* at 35, "trial by jury has its weaknesses," and in this type of case its institutional shortcomings are particularly acute. No jury, however select or sophisticated, is as well placed as a judge to try such a case: it cannot, like the judge, preserve its recollection in contemporaneous notes, question the witnesses, study the exhibits, or interpellate counsel as the trial unfolds. It can neither acquaint

itself with the case before trial, nor review the whole record at leisure afterwards in reaching its decision. In a case sufficiently long and complex, these institutional handicaps may well prevent the jury from rendering the fair and true verdict which trial by jury implies.

In *Patton* v. *United States,* 281 U.S. 276 (1930), and *Adams* v. *United States ex rel. McCann,* 317 U.S. 269 (1942), this Court held that a federal criminal defendant may waive his right to jury trial. More recently, in *Singer* v. *United States, supra,* the Court relied in part on Rule 23(a) to hold that a defendant is not entitled to waive jury trial over the prosecution's objection when his sole justification for waiver is that trial to the court would save time. However, the Court expressly reserved the question whether a federal court might try a case without a jury despite the prosecution's opposition when the defendant offered special and substantial justification for waiver:

> "We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial. Petitioner argues that there might arise situations where 'passion, prejudice . . . public feeling' or some other factor may render impossible or unlikely an impartial trial by jury. However, since petitioner gave no reason for wanting to forgo jury trial other than to save time, this is not such a case, and petitioner does not claim that it is." 380 U.S. at 37-38 (footnote omitted).

The question expressly reserved in *Singer* is presented here. Asserting that the nature of the case

rendered it unsuitable for decision by the jury process, the defendants pointed out that trial would be protracted, would involve a great deal of expert testimony, and would turn on highly complex and specialized accounting and financial issues.[2] They also pointed to the institutional weaknesses impeding a jury from dealing fairly and adequately with the case.

The defendants thus made a substantial showing that a jury might well be unequipped to decide the case properly. The prosecution adduced no justification for its insistence on a jury trial. The judges who presided over the two trials agreed with the defendants that it was "an extremely complicated case" (R. 116, p. 15), and that it was "highly technical and complex." (Tr. 4255). Both nonetheless denied the requested waiver on the ground that under Rule 23(a) and *Singer,* a federal court lacks power to try a case without a jury over the prosecution's opposition.[3] The Court of Appeals did not consider whether the defendants' reasons for seeking to waive the jury were sufficiently substantial to sustain the waiver; it too was apparently of the view that a federal court is power-

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[2] These predictions were amply borne out by events. The first trial consumed nearly two months and the second lasted over a month. The record of the second trial includes over 4,250 pages of transcript and over 190 exhibits. The Court of Appeals' Opinion conveys the breadth and difficulty of the case.

[3] The judge presiding over the first trial stated that, under Singer, a federal court lacks "power" to direct a non-jury trial over the Government's opposition unless defendant satisfies the well-nigh impossible burden of proving that "it will be impossible to obtain a fair trial before a jury." (R. 116, p. 14). The judge at the second trial, in referring to the possibility of a non-jury trial, stated that the prosecution's opposition "disposes of that matter." (R. 117, p. 3).

less to provide for non-jury trial over the bare opposition of the prosecution.[4]

The power of a federal court to ensure fair trial is not, we submit, so circumscribed as the courts below believed. Not only is their position unbidden by *Singer,* it is inconsistent with *Singer's* suggestion that waiver may be had despite the prosecution's objection when a substantial showing of justification is made. The notion that a federal court is wholly without power to order a non-jury trial is also inconsistent with this Court's recent statement in *United States* v. *Jackson,* 390 U.S. 570, 584 (1968): "[T]he fact that jury waivers . . . may occasionally be rejected hardly implies that all defendants may be required to submit to a full-dress jury trial as a matter of course." Nor does the view taken by the courts below comport with the constitutional importance of assuring fair trial which this Court has increasingly recognized in other circumstances. *E.g., Witherspoon* v. *Illinois,* 391 U.S. 510 (1968); *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *Turner* v. *Louisiana,* 379 U.S. 466 (1965).

In addition to its apparent inconsistency with views expressed by this Court, the rule applied below is unsound. When a case is likely to be better tried without a jury, the defendant's interest in a fair and accurate trial should prevail unless it is shown that some overriding public interest prohibits trial to the court. Certainly Rule 23(a) does not stand in the way of a non-jury trial when there is no demonstrated justification for the prosecution's opposition to a well-supported request for jury waiver. For while it literally requires

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[4] See United States v. Abrams, 357 F.2d 539 (2d Cir.), *cert. denied,* 384 U.S. 1001 (1966), cited by the Court of Appeals as the basis for its rejection of defendants' claim that they should have been afforded a non-jury trial.

the prosecutor's consent, Rules 23(a) need not be read as giving prosecutors power to withhold consent unreasonably. The prosecutor is an officer of the court and a federal law enforcement agent. As such, he is fully subject to this Court's "supervisory power over the administration of criminal justice in the federal courts." *Elkins* v. *United States,* 364 U.S. 206, 216 (1960); *McNabb* v. *United States,* 318 U.S. 332 (1943); *Johnson* v. *United States,* 318 U.S. 189, 199 (1943). This power may appropriately be used to prohibit unfair and unjustified opposition by prosecutors to non-jury trial.

The Court has apparently never considered this or similar approaches to the problem that *Singer* posed but failed to decide—defining the circumstances in which the defendant's established interest in a fair trial may prevail over the Government's preference for a jury trial. The problem is unresolved, has continuing significance, and deserves review here. The Court should grant certiorari.

II.

The Court of Appeals approved instructions which allowed the jury to convict the defendants for alleged deficiencies in their professional work even if it found that such work conformed in all respects to the recognized standards of their profession. So far as diligent research discloses, this is the first case, criminal or civil, to hold that conduct governed by professional standards may be measured otherwise than by those standards. This Court should grant review because the test of criminal liability for professional conduct under federal law is of broad importance, and because the novel test of liability approved by the Court of Appeals is unfair, unsound, and contrary to established principles.

A. The prosecution's essential allegations were (1) that Continental's 1962 balance sheet was false and misleading, and (2) that the defendants knew it to be so. The Institute takes no position here as to the sufficiency of the evidence, under proper instructions, on either of these basic elements. However, the instructions to the jury on the first element involved error of far reaching importance.

Because nondisclosure rather than affirmative misrepresentation was alleged, the jury was necessarily required to determine whether the balance sheet fairly presented Continental's financial position. The trial court charged the jury that this was the "critical test" and the Court of Appeals approvingly remarked that "[t]he critical test according to the charge was the same as that which the accountants testified was critical." However, the Court of Appeals brushed over the more fundamental question at issue: the standards for judging whether an accounting presentation is fair. The accountant experts testified to fairness of presentation *in conformity with generally accepted accounting principles,* and the defendants' opinion on Continental's financial statements had made its representations in those terms. The jury, however, was told that it might ignore generally accepted accounting principles and might evaluate the accounting presentation from the subjective viewpoint of what it thought "an average, reasonably prudent person" might wish to know. In so permitting disregard of professional standards the courts below committed error whose importance goes well beyond this case.

The failure of the courts below to require that the defendants' opinion on Continental's balance sheet be judged by the standards of the defendants' profession

may well have governed the verdict in this case. The eight defense experts (whom the Court of Appeals characterized as "an impressive array of leaders of the profession") viewed the balance sheet against that professional frame of reference and testified that they found the presentation fair. Had the jury been required to take the same perspective, it might well have reached the same conclusion.[5]

But there is also a more general and long range significance to the differences between the professional perspective of an independent public accountant and the desires of investors or the viewpoints of other laymen. These differences in perspective may frequently produce differences between the meaning of "fair presentation" under generally accepted accounting principles and the meaning of "fair presentation" in a layman's view. In approving the jury's application of a layman's perspective in assessing accountants' work, the Court of Appeals' decision exposes accountants to possibly drastic liability for failure to meet a different benchmark from that which they have been trained to follow and which they have contracted to meet.

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[5] We do not, of course, argue here that the jury could not have convicted if it had taken generally accepted accounting principles as its guide. It is a cardinal rule of accounting that an accountant must require disclosure of all material facts known to him if such disclosure is necessary in order to make a financial statement not misleading. *E.g.*, American Institute of Certified Public Accountants, Code of Professional Ethics, Art. 2.02(a). The prosecution's two expert witnesses testified that the presentation was not fair according to this standard, and the jury could have credited their testimony. However, the possibility that the jury might have reached the same result by following a permissible route does not rescue from error instructions that guided them along an improper route.

Independent public accountants have for many decades taken generally accepted accounting principles as their touchstone in expressing their opinion on financial statements. Substantially all public corporate financial reporting in the United States conforms to and is guided by generally accepted accounting principles. These principles comprise a body of conventions, rooted in the premises of accountancy and developed over a long span of years, whose ultimate purposes are to supply consistency and coherence to the financial statements of a given company and to promote comparability among financial statements of different companies.

In serving these purposes, generally accepted accounting principles require disclosure in useful form of much information that investors and others wish to know. They do not, however, assure—and are not intended to assure—disclosure of every matter that might possibly be of interest to an investor or lender. Indeed, in some instances they may point to quite a different result: for example, generally accepted accounting principles require, in the interest of objectivity, that land be carried on a balance sheet at cost, rather than at current market value which might be of greater interest to investors. Thus, it is understood by the accounting profession and widely recognized by issuers and users of financial statements and interested governmental agencies that, while audited financial statements present much information of importance to investors, they cannot necessarily be expected to present all the financial information which investors need or want.

The various forms and regulations of the Securities and Exchange Commission, whose prime concern is

to promote investor protection through full disclosure, recognize the special function of generally accepted accounting principles and the fact that not all information of interest to investors will necessarily be disclosed in financial statements that conform to those principles. For example, the Commission's Form S-1, 17 C.F.R. § 239.11, governing most registration statements filed under the Securities Act of 1933, requires disclosure of a number of important financial items outside the audited financials, in portions of the registration statement for which accountants have no responsibility.

Similar recognition of the distinction between information required to be set out in financial statements, and other investor information that may be disclosed elsewhere, is found in the Commission's Form 10-K, 17 C.F.R. § 249.310,[6] the annual filing by companies subject to the reporting requirements of the Securities Exchange Act of 1934, and in Schedule 14A, 17 C.F.R. § 240.14a-101, governing the information to be contained in proxy statements. It is only on the information disclosed in financial statements that the Commission requires an independent public accountant's opinion, which deals with fair presentation *in conformity with generally accepted accounting principles.*

The Court of Appeals did not deal with these considerations at all. Instead, it advanced two purported justifications for disregarding generally accepted ac-

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[6] It should be noted that the instructions to Form 10-K require disclosure in the text, but not in the financials attached thereto, of interests of management in material transactions, which might encompass indirect loans to officers like those from Valley to Roth.

counting principles. First, the court stated that generally accepted accounting principles did not specifically deal with the precise issues of disclosure involved here. But lack of dispositive precedent does not disturb the essential point that the particular issues of disclosure should have been judged from the viewpoint of trained professional accountants rather than from a subjective layman's outlook. It is precisely when there is no explicit rule that judgment based upon the premises of a profession is most demanded.

Second, the Court of Appeals suggested that any differences between generally accepted accounting principles and a lay notion of proper disclosure were immaterial because Roth's "looting" was required to be disclosed under either standard. As the Court pungently asserted, "If certification does not at least imply that the corporation has not been looted by insiders so far as the accountants know . . . it would mean nothing." While the Institute has no quarrel with this statement, it can not serve to justify the result in this case because the instructions to the jury did not permit them to consider "looting" as a factor requiring disclosure: indeed, the jury was specifically instructed that there was no evidence that Roth's conduct was not honest and lawful. The more general problem, however, is that the Court of Appeals' approval of instructions which permitted the jury to judge professional work by other than professional standards will not necessarily be limited in precedential effect to cases found to have involved "looting."

The Institute's concern is with such broader implications of the Court of Appeals' decision. It is to these that we now turn.

B. In approving instructions that permitted the jury to disregard generally accepted accounting principles in evaluating the defendants' work, the Court of Appeals departed from the long established rule that professional conduct must be judged according to professional standards. This rule, which gives due recognition to the special burdens on professional men and the unfairness of penalizing errors of judgment that do not rise to a violation of professional standards, is well settled in cases where civil liability is sought to be imposed. *See, e.g., Davis* v. *Virginian Ry. Co.,* 361 U.S. 354, 357-58 (1960) (medicine); *Escott* v. *BarChris Constr. Corp.,* 283 F. Supp. 643, 703 (S.D.N.Y. 1968) (accountancy). *A fortiori,* the same rule applies in criminal cases where the sanctions involved are far harsher and conviction alone will end a man's professional career.[7] *Cf. People* v. *Kresel,* 243 App. Div. 137, 277 N.Y.S. 168, 175-76 (3d Dept. 1935) (law).

The reasons for such a rule are plain. It is fundamentally unfair to require a man to conform to an uncertain standard of conduct that is established by a jury after the fact, and that differs from and may well conflict with the standards of his profession. Our law prohibits standards of conduct so vague that "men of common intelligence must necessarily guess at [their]

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[7] A possible exception to this broad principle should be noted. The Institute recognizes that an accountant might be guilty of fraud even though the financial statements upon which he had issued his opinion were in full conformity with generally accepted accounting principles: if, for example, a purpose to defraud were shown by evidence independent of the professional conduct itself, and formal compliance with accounting principles exposed as mere sham or subterfuge. That, however, would be an exceptional situation, and no one has contended that this was such a case.

meaning and differ as to [their] application." *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926). See also *Wright* v. *Georgia*, 373 U.S. 284 (1963); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939). This policy has special pertinence here, for the baneful effects of uncertainty are especially acute when professional men may not rely on the established standards of their profession but must, at the peril of well-nigh unbearable liability, conform to open-ended and essentially subjective standards established in retrospect by a lay jury.

The special impact of such uncertainty on professional men was stressed in a recent decision of the United States District Court for the District of Columbia, which the Government has appealed to this Court, *United States* v. *Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969), *jurisdictional statement docketed*, 38 U.S.L.W. 3303 (U.S. Feb. 2, 1970) (No. 1155). Dismissing an indictment against a physician for having performed an illegal abortion on the ground that the language of the statute was unconstitutionally vague, the court stated that:

> "The jury's acceptance or nonacceptance of an individual doctor's interpretation of the ambivalent and uncertain word 'health' should not determine whether he stands convicted of a felony, facing ten years' imprisonment. His professional judgment made in good faith should not be challenged. There is no one standard to guide either the doctor, the jury or the Court." 305 F. Supp. at 1034.

Although no statute's constitutionality is here involved, the implications of this case for professional men are

closely similar to those of *Vuitch,* and equally deserve consideration by this Court.

The Court of Appeals' approval of the leave given to the jury to disregard accepted professional standards and substitute its own notion of what standards should be not only is novel and unfair, but serves no substantial public interest. Professional standards should of course be open to challenge and change, but criminal prosecution and punishment are not appropriate methods for amending accepted professional standards or divising new ones. Not only are professional organizations ordinarily available as instruments of change—and in the case of accountancy the Institute has certainly performed this role—but governmental agencies, such as the Securities and Exchange Commission in the case of accounting, can where necessary compel needed reforms in professional standards. Such bodies are significantly better equipped to weigh all relevant considerations than a jury or judge hedged by the narrow confines of a criminal prosecution. Moreover, they can accomplish reforms in standards by means that are far more fair and even handed than retroactive imposition of criminal liability upon isolated individuals.

This case for the first time squarely presents a far-reaching issue of criminal liability for professional conduct. The issue is of vital concern to accountants and other professionals. The Court of Appeals' decision rejects established principles and is contrary to considerations of fairness and public policy. This Court should grant review.

CONCLUSION

For the reasons stated in this brief and in the petition for certiorari, certiorari should be granted.

Respectfully submitted,

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